IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 10, Original

THE STATE OF WYOMING,
COMPLAINANT,

vs.

THE STATE OF COLORADO,
DEFENDANT.

DEFENDANT'S PETITION FOR REHEARING.

BYRON G. ROGERS,
Attorney General of the State of Colorado.
HENRY E. LUTZ,
Deputy Attorney General.
SHRADER P. HOWELL,
Assistant Attorney General.

THE BRADFORD ROBINSON PTG. CO., DENVER

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

It is submitted that the holding of the Court in this case constitutes a modification of its decree, the consequences whereof, (unless the decree shall be further modified) will work irremediable injury to Colorado.

The suit as originaly instituted related only to a proposed diversion from the Laramie River of some 50,000 acre feet of water for what is known as the Laramie-Poudre Tunnel. This Court by its original injunction restricted the tunnel diversion to 15,500 acre feet annually, after having ascertained, in the manner it pointed out, that such

amount only was available after gratifying prior Wyoming water rights.

The doctrine of priority as between appropriators was adopted and applied by this Court because that principle was in effect in both states. This Court entered no injunction respecting the Skyline Ditch appropriation of 18,000 acre feet, the Meadowland appropriations of 4,250 acre feet, the Deadman Creek or Wilson Supply Ditches, but left those Colorado appropriations not affected.

This Court unmistakably and unquestionably dealt with those several appropriators as individuals in accordance with what was deemed to be their respective rights based on use under their respective appropriations.

This is confirmed by an expression of this Court found at *page 576, 298 U. S.*, where it is said:

> "We are of opinion that the record, opinion, and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two states, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered, and resolved in the opinion. Not only so, but the question of priority in time and right as between the appropriations in Colorado and those in Wyoming was directly presented by the pleadings and evidence and distinctly dealt with and resolved in the opinion."

The only limitation as noted was upon the tunnel appropriation.

In 1936 this Court by its injunction specifically limited the Meadowlands to 4,250 acre feet annually, headgate diversion and rejected the doctrine of consumptive use. It is true that the various appropriations discussed, together with those limited by this Court, aggregated 39,750 acre feet annually. It is also true, however, that for a period of approximately seventeen years, or from 1922 to 1939

when the Colorado District Court undertook to construe the decree of this Court as making a mass allotment only to Colorado, that each of the several Colorado appropriators regarded himself as vested individually by the decree of this Court with his individual accredited amount. Wyoming until the present instance has adopted the same theory.

This Court now confirms the interpretation of the Colorado District Court with no provision for the consequences it entails.

It may perhaps be assumed that this Court until its decision of April 22, 1940 also viewed its prior decisions as relating to individual as distinguished from mass allotment to Colorado, otherwise Colorado would not have been cited to show cause with relation to the 4,250 acre feet Meadowland appropriation, but would instead have been cited for having exceeded the total of 39,750 acre feet.

This Court now says in effect that the injunction respecting the Meadowlands is inoperative. The entire 39,750 acre feet may now, we take it, be diverted through that appropriation to the exclusion of all the transmountain allotments. And that in truth is just about what will transpire. It appears from Wyoming's petition herein and the returns thereto that on June 18th, 1939 when the headgates were closed the full 39,750 acre feet had been exhausted, and this indeed before the growing season got fairly under way. No crops can be grown to maturity in such circumstances.

There is one solution only, unless Colorado's major rights are to be destroyed, and that is for this Court to now recognize the return flow from these Meadowland appropriations. Failing such recognition will be to perpetuate factual error to the irreparable damage of Colorado. Failure to so recognize the return flow will nullify the doctrine of "Equitable Apportionment" laid down by this Court. It will result in great inequality as between the two states and will award Wyoming an inordinate share of the waters of the Laramie River.

As has been heretofore pointed out to this Court,

Wyoming in her original bill—her effort to enjoin the tunnel appropriation to another water shed—alleged at page 7, Volume I, Transcript of Record, now on file with this Court, that approximately seventy-five per cent of the Meadowland appropriations return to the Laramie River before it reached Wyoming and hence became subject to Wyoming appropriations and use.

In our Return to the Rule it was pointed out that Wyoming through its responsible officials even now agrees that seventy-five per cent or more of all such water returns to the Laramie River; and it was pointed out that the District Court of Colorado found as a fact approximately ninety per cent of the Meadowland appropriations return to the Laramie River.

The Court has in its rejection of the return flow principle applied a mere generality of theory in opposition to the specific facts exhibited by the record.

The acreage in question presents a status wholly distinct from all other Colorado lands using water from the Laramie River.

It is disclosed by the testimony of the various witnesses (pp. 396, 452, 512, 522 and 528 of the record) that the lands are of high elevation and that for the most part the irrigated portions lie immediately adjacent to the Laramie River. The valley is narrow, ranging in width from 200 feet to perhaps three-fourths of a mile, and the slope is toward the stream. The soil is porous and sandy, and the run-off is rapid. The growing season is short and the crops are limited to a single cutting of native hay of natural growth. The method of irrigation is and always has been what is known as the "flooding" method. No other method has ever been used as respects these lands. It is the only method available and adaptable to the nature of the soil and the situation on the ground. It is the same method employed by Wyoming users similarly situated (R. 481-485). True, it does involve a temporary diversion of considerable quantities of water. It does not involve ultimate depletion

of the river, nor does it involve a consumptive or beneficial use of more than the allotted 4,250 acre feet per annum.

The last is an engineering question, and at least seven experts have so given it as their opinion, see for instance the testimony of M. C. Hinderlider, State Engineer of Colorado (R. 411-412); C. L. Patterson, Irrigation Engineer (530 R.); R. J. Tipton (513, 517 and 864 R.), Professor Keezer (524-525 R.); H. L. Potts (554 R.), and George M. Bull (768 R.).

And this Court in its first opinion in this cause (page 483, 259 U. S.) expressly recognized return flow as a factor but has refused to apply it to Colorado. See for instance the following:

> "Where the places of use are in the same watershed and relatively near the stream, as is true of the lands on the Laramie Plains served by the greater part of the Wyoming appropriations, a substantial amount of water percolates back into the stream from irrigated areas and becomes available for further use lower down the stream. This is called return water. The amount varies considerably and there is no definite data on the subject. As respects irrigation on the Laramie Plains above the Wheatland diversion, the evidence satisfies us that the return water will certainly more than counterbalance the loss through evaporation and otherwise when the period of storage is not more than from one year to the next."

It has heretofore been pointed out to this Honorable Court, how under the Colorado decree confirmed by this Court, a loss of approximately 20,000 acre feet will and must inevitably ensue to Colorado appropriators and to such extent enlarge the benefits of Wyoming. In other words, that Colorado instead of receiving 39,750 acre feet will in fact receive not to exceed one-half that amount, unless this Court shall recognize and give effect to the true facts obtaining as respects the return flow from the Meadowlands. Otherwise grievous error will be perpetuated.

We appeal to the Court to grant a rehearing herein as respects the matter presented. In view of the Court's present interpretation of its several decisions such becomes imperative. Prior to this Court's last pronouncement, occasion for relief was not imperative. What were deemed the priorities fixed by this Court are now set aside.

Now by this Court's latest decision the contrary appears as respects individuals.

And too, it was said by this Court, *page 579, 298 U. S.*, that:

> "One complaint is of diversions through what are described in the bill and answer as Bob creek ditch, Bob creek extension ditch, Columbine ditch, and Lost Lake reservoir system. These diversions are admitted in the answer. They are made, not under claims recognized or confirmed in the decree, but quite independently of it. Under the decree, as it is pointed out in our opinion overruling the motion to dismiss, the Colorado claims which the decree recognizes and confirms are the only ones in virtue of which diversions may be made as against Wyoming and her appropriators. Claims not so recognized and confirmed are excluded."

Now the Bob Creek and other appropriators mentioned *supra* are claiming rights which will infringe upon the total of 39,750 acre feet annually. Immediately after this Court's ruling with respect to these rights, the State Engineer of Colorado on the advice of the Attorney General terminated all Bob Creek appropriations and destroyed a portion of the diversion works, but under the Court's last holding in this case all these rights are now restored and those whose rights were previously determined, as was supposed, will now have to share with others who have not had the travail of long litigation and whose claims were thought at rest.

Hence Defendant Colorado again respectfully renews its appeal for a rehearing of the return flow question.

Otherwise, Colorado's rights will stand half destroyed for all time.

Respectfully submitted,

BYRON G. ROGERS,
Attorney General of the
State of Colorado.

HENRY E. LUTZ,
Deputy Attorney General.

SHRADER P. HOWELL,
Assistant Attorney
General.

COUNSEL'S CERTIFICATE.

The undersigned, Attorney General and counsel in the above designated cause, hereby certifies that the above and foregoing Petition for Rehearing has not been filed for delay, and further that in his opinion said Petition is meritorious.

BYRON G. ROGERS,
Attorney General of the
State of Colorado.

SUPREME COURT OF THE UNITED STATES.

No. 10, Original.—October Term, 1935.

The State of Wyoming, Complainant,
vs.
The State of Colorado, Defendant.

[April 22, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The State of Wyoming sought leave to file its petition for a rule requiring the State of Colorado to show cause why it should not be adjudged in contempt for violation of the decree in this suit, restraining diversions of water from the Laramie river. 259 U. S. 419, 496; 260 U. S. 1; 286 U. S. 494; 298 U. S. 573.

In response, Colorado asked that evidence be taken to determine the amount of return flow to the Laramie river from the diversions at the headgates of meadowland ditches and that Colorado have credit therefor. This matter had been considered by the Court in framing its decree (298 U. S. pp. 581, 582) and the motion was denied. Leave was granted to Wyoming to file its petition and Colorado was directed to show cause accordingly.

Two returns have been filed on behalf of Colorado, one by the Governor of the State setting forth his executive order directing the withdrawal of the appearance of the Attorney General and appointing special counsel to represent the State, and another return by the Attorney General who challenges the authority of the Governor to supersede him. In the view we take of the material matters presented, we find no such differences between the two returns as to require us to determine the question of authority.

Wyoming charges that from May 1, 1939, to June 18, 1939, Colorado diverted from the Laramie river 39,865.43 acre feet, that is, somewhat in excess of the total of 39,750 acre feet allocated to Colorado by our decree; that thereupon, and on June 19, 1939, Colorado closed the headgates of the various ditches involved; that on June 22, 1939, in violation of the decree, Colorado opened the headgates and permitted the diversion between June 22, 1939, and July 11, 1939, of 12,673 acre feet in excess of the 39,750 acre feet allowed;

and that in particular, with respect to meadowland ditches, Colorado permitted the diversion between May 1, 1939, and July 11, 1939, of 24,775 acre feet above the 4250 acre feet (measured at the headgates) specifically allowed for the meadowland appropriations. 298 U. S. p. 586.

In defense, Colorado contends that the meadowland diversions in excess of 4250 acre feet were in accordance with Colorado law and were not inconsistent with the decree of this Court until a diversion by Colorado from the Laramie river for all purposes reached the allocated total of 39,750; that the diversion of an amount greater than that total during the period above specified was with the acquiescence of Wyoming; and that Wyoming has not been injured.

Colorado pledges that hereafter its officials will administer the flow of the Laramie river in that State in accordance with Colorado laws and adjudication decrees until a total amount of 39,750 acre feet, measured at the headgates, has been diverted, and, when that total has been reached in any year, Colorado can and will close the headgates and keep them closed during the remainder of the irrigation season.

In support of the contention that the diversion of more than 4250 acre feet for the meadowland appropriations should not be regarded as a violation of our decree, if the aggregate diversions in Colorado do not exceed the total allowed, Colorado presents a declaratory judgment of the District Court of that State for the County of Laramie, entered February 2, 1939, in the suit of *Adelrick Benziger* v. *The Water Supply & Storage Company, et al.* That suit was brought on behalf of the meadowland appropriators in Colorado, and the defendants were the other appropriators in that State whose respective appropriations had been the subject of consideration in the suit in this Court. Our rulings were examined by the state court which concluded that they were intended to, and did, determine only the relative rights of the two States to divert the waters of the Laramie river and its tributaries and that it was not our purpose to withdraw the appropriations and water claims in Colorado from the operation of its local laws or to restrict the utilization of the waters in any way "not affecting the rights of the State of Wyoming and her water claimants". Accordingly the state court held that the fixing in our decree of the meadowland appropriations was intended only to bear upon the relative rights of the

States and was not intended to be an adjudication of the relative rights of the decreed appropriations in Colorado; hence, that so long as the aggregate of the water diverted in Colorado does not exceed the total of 39,750 acre feet accredited to the Colorado appropriations, as stated, they are subject to the laws of Colorado. In that view the Court adjudged that the meadowland appropriators and the defendant appropriators were entitled to divert according to their respective priorities until they reached the amount of 39,750 acre feet, and that when that amount had been diverted "all headgates are to be closed for the balance of the season".

A review of our decisions confirms the construction thus placed upon them. Suit was brought in 1911 to prevent a proposed diversion in Colorado of the waters of the Laramie river, an interstate stream. Voluminous evidence was taken, the case was thrice argued, and a final decision was rendered in 1922. 259 U. S. 419. After an elaborate consideration of the physical features of the region and the principles applicable to a determination of the rights of the respective States, the Court concluded that as both States had adopted the doctrine of appropriation, it was equitable to apply that doctrine and to determine their respective rights according to the rule of priority. The Court examined the evidence with respect to the flow of the stream, its variations, and other relevant matters, and found that the available supply—288,000 acre feet—was not sufficient to satisfy the Wyoming appropriations and also the proposed Colorado appropriation. The Court found that there were some existing Colorado appropriations entitled to precedence over many of those in Wyoming. These included 18,000 acre feet for what was known as the Skyline Ditch and 4250 acre feet for meadowland appropriators. These were not to be deducted, as the 288,000 acre feet was the available supply after they were satisfied. The proposed Colorado appropriation which was in controversy in the suit was that known as the Laramie-Poudre Tunnel diversion, a part of an irrigation project known as the Laramie-Poudre project. The evidence showed that the Wyoming appropriations having priorities senior to the one in Colorado, and which were dependent on the available supply above specified, required 272,500 acre feet. Deducting that from the available 288,000 acre feet there remained 15,500 acre feet which were subject to the proposed appropriation in Colorado. Accordingly a decree was entered enjoining the defendants from diverting more than 15,500 acre feet annually from the Laramie river through the Laramie-Poudre pro-

ject. The decree provided that it should not prejudice the right of Colorado, or of anyone recognized by her as entitled thereto, to continue to divert 18,000 acre feet through the Skyline Ditch and 4250 acre feet through the meadowland appropriations. 259 U. S. pp. 496, 497. Soon after, this decree was modified so as not to prejudice a diversion by Colorado for the Wilson Supply Ditch (260 U. S. 1), a diversion which amounted to 2000 acre feet. 298 U. S. p. 580. In this way the total allowed to Colorado amounted to 39,750 acre feet.

In 1931, Wyoming brought another suit in this Court, alleging that Colorado was permitting excessive diversions and seeking the protection and quieting of Wyoming's rights under the former decree. Wyoming asked provision for accurately measuring and recording the quantities of water diverted and also an injunction restraining excessive diversions, if it were held that the former decree related only to the diversion by the Laramie-Poudre Tunnel appropriation. Motion to dismiss the bill was denied. We held that the former decree should be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries; that the limited injunction did not warrant an inference that it marked "the limits of what was intended to be decided", but that the decree did define the quantity of water which Colorado and her appropriators might divert "from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators". 286 U. S. 494, 506-508.

Final hearing was had and the case was decided in 1936. 298 U. S. 573. Wyoming contended that while the decree fixed the amount of the diversions under the meadowland appropriations in Colorado at 4250 acre feet, the actual diversions had ranged from 36,000 to 62,000 acre feet. Colorado answered that the greater part of this water was returned to the stream through surface drainage and percolation and that the part actually consumed did not exceed the amount which the decree allowed. The Court said that the amount of 4250 acre feet had been fixed as the measure of the meadowland appropriations because it was deemed sufficient for that purpose "when the water is rightly and not wastefully applied". The Court referred to the wasteful process that had been used. It was said that when water is so applied a considerable portion ultimately finds its way back into the stream, but that it was also true "that a material percentage of the water is lost by

evaporation and other natural processes and there is no way of determining with even proximate certainty how much of the water returns to the stream". The Court then held that the decree referred to the water taken from the stream "at the point of diversion, and not to the variable and uncertain part of it that is consumptively used". As it was plainly shown that diversions were being made under the meadowland appropriations in quantities largely in excess of the amount fixed in the decree, an injunction issued forbidding further departures from the decree in that regard. *Id.*, pp. 581, 582.

With respect to the request for an order permitting Wyoming to install measuring devices for the purpose of determining the amount of water diverted in Colorado, the Court recognized that the problem of measuring and recording the diversions was a difficult one and the hope was expressed that the two States by cooperative efforts would find a satisfactory solution. Leave was granted to Wyoming to make a later application if the States were unable to agree. *Id.*, pp. 585, 586. It seems that measuring devices have been installed.

While an injunction was thus granted with respect to diversions for the meadowland appropriations in excess of 4250 acre feet, this was manifestly upon the assumption that Colorado was otherwise using the total amount of water allocated to that State. That it was not intended to restrict Colorado in determining the use of the water of the river, according to Colorado laws and adjudications, provided the diversions did not exceed the aggregate amount of 39,750 acre feet to which Colorado was entitled, is clear from the ruling upon another branch of the case. It appeared that the diversion for the Skyline Ditch had been above the amount allowed therefor, but that other diversions were less, so that, eliminating the excessive meadowland diversions, the aggregate allowance to the State would not be exceeded. Hence the Court found that it must consider Colorado's contention "that, consistently with the decree, she lawfully may permit diversions under any of the recognized appropriations in excess of its accredited quantity, so long as the total diversions under all do not exceed the aggregate of the quantities accredited to them severally". *Id.*, p. 583.

The Court noted that in both Colorado and Wyoming water rights were transferable and that the use of the water may be changed from the irrigation of one tract to the irrigation of another,

if the change does not injure other appropriators; that these rules were but incidental to the doctrine of appropriation, prevailing in both States, upon which the decree had been based. The Court observed that it was not its purpose "to withdraw water claims dealt with therein from the operation of local laws relating to their transfer or to restrict their utilization in ways not affecting the rights of one State and her claimants as against the other State and her claimants". It was found that the diversions through the transmountain ditches had been made with the consent of the owners of the water rights and with the full sanction of Colorado, and hence the situation was not different from what it would have been if the owners of other claims had formally transferred parts of their water rights to the Skyline owners. The Court said: "But the Skyline owners are now permitted by the owners of the other claims and by Colorado to take and use part of the waters included in those claims. Wyoming and her claimants are in no way injured by this. No departure from the decree is involved. The thing which the decree recognizes and confirms is 'the right of the State of Colorado, *or of anyone recognized by her as duly entitled thereto,* . . . to divert and take' the water included in the designated appropriations". The Court concluded that in the circumstances shown the Skyline Ditch diversions did not constitute an infraction of the decree. *Id.*, pp. 584, 585.

It is plain that the principle of this ruling, as applied to the transmountain appropriations which diverted the water of the Laramie river to another watershed, would certainly also apply to the meadowland appropriations within the same watershed, where part of the water diverted may find its way back to the stream. The limitation of the meadowland appropriations to 4250 acre feet was to keep the diversions in Colorado within the amount allowed to that State, not to prevent the distribution of the water thus allowed, according to Colorado laws, where there was no infraction of the rights of Wyoming and her water claimants.

We conclude that the decree is not violated in any substantial sense so long as Colorado does not divert from the Laramie river and its tributaries more than 39,750 acre feet per annum.

In 1939, however, Colorado diverted more than that total amount. Apparently no question had been raised by Wyoming as to the diversions in 1937 and 1938. It is undisputed that when the diversions in 1939 reached 39,865.43 acre feet on June 19th, Colorado

closed the headgates of the various appropriations within that State. But Wyoming alleges that Colorado wrongfully permitted the headgates to be reopened on June 22d and to remain open until July 11th, thus permitting the diversion of 12,673 acre feet in excess of the aggregate amount allowed to Colorado, despite Wyoming's protest. That there was this excessive diversion is not controverted.

Colorado insists that Wyoming has not been injured. But such a defense is not admissible. After great consideration, this Court fixed the amount of water from the Laramie river and its tributaries to which Colorado was entitled. Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights. If nothing further were shown, it would be our duty to grant the petition of Wyoming and to adjudge Colorado in contempt for her violation of the decree.

But Colorado insists that the diversion of more than the allocated total during the season of 1939 was with Wyoming's acquiescence. That is the sole available defense. To support it, Colorado has presented affidavits showing communications between an association of meadowland appropriators and the special hydrographer of Wyoming and also stating that at a conference in the office of the Governor of Colorado on July 1, 1939, the officers of Wyoming said that they had no objection to continued diversions being made through the meadowland ditches for the reason that a great portion of the water so diverted returned to the Laramie river to be used downstream by Wyoming appropriators. Wyoming presents affidavits to the contrary, setting forth her demands. It is unnecessary to review in detail the points in controversy. In the light of all the circumstances, we think it sufficiently appears that there was a period of uncertainty and room for misunderstanding which may be considered in extenuation. In the future there will be no ground for any possible misapprehension based upon views of the effect of the meadowland diversions or otherwise with respect to the duty of Colorado to keep her total diversions from the Laramie river and its tributaries within the limit fixed by the decree.

For the reasons stated, the petition of Wyoming is denied, the costs to be equally divided.

It is so ordered.